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11-1800-10527-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Rate Appeals of Lyngblomsten Care Center and Camilia Rose	ORDER REGARDING CROSS MOTIONS FOR SUMMARY DISPOSITION

The above-captioned matters are pending before Administrative Law Judge Barbara L. Neilson pursuant to Notices of and Orders for Hearing and Prehearing Conference issued by the Deputy Commissioner of the Minnesota Department of Human Services on November 16, 1995, and April 11, 1996. The parties stipulated to the consolidation of these two cases since they address the same legal issue. Both parties have moved for summary disposition. Oral argument regarding the motions was heard on November 27, 1996, at the Office of Administrative Hearings in Minneapolis, Minnesota, at which time the record with respect to the motions closed.

Samuel D. Orbovich and Thomas L. Skorczeski, Attorneys at Law, Orbovich & Gartner, 710 North Central Life Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of Lyngblomsten Care Center and Camilia Rose (hereinafter referred to jointly as the "Providers"). Robert V. Sauer, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Human Services (hereinafter referred to as the "Department" or "DHS").

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED that the Department's Motion for Summary Disposition is GRANTED and that the Providers' Motion for Summary Disposition is DENIED.

Dated this 17th day of January, 1997.

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BARBARA L. NEILSON
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact David Doth, Commissioner, Minnesota Department of Human Services, Second Floor Human Services Building, 444 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument. Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Lyngblomsten Care Center, Inc., and Camilia Rose Company, Inc., are licensed nursing homes in St. Paul and Coon Rapids and are certified to provide long-term care to recipients under Minnesota's Medical Assistance ("MA") program. They receive reimbursement from the Department of Human Services for allowable costs incurred in providing care to Minnesota nursing home residents under the federal Medicaid Act, 42 U.S.C. § 1396a, and the State's Medical Assistance Program, Minn. Stat. Ch. 256B. The reimbursement rates at issue in this proceeding were set under Minn. Stat. § 256B.41 through 256B.48 and Minn. Rules 9549.0010 through 9549.0080 ("Rule 50"). Under the governing statute and Rule 50, nursing home providers are reimbursed for care provided to Medical Assistance recipients by a total payment rate paid per day. This rate consists of a number of separately calculated components, including a property-related payment rate and a capital-repair-and-replacement rate. Minn. Stat. §256B.431, subds. 15 and 16; Minn. R. 9549.0070, subp. 1. These are the components of the overall rate that are involved in the present case. To receive medical assistance payments, nursing homes submit annual cost reports showing costs incurred during the reporting year, which generally runs from October 1 through the following September 30. Minn. R. 9549.0041, subp. 1. During desk audits, DHS auditors review the cost reports and supporting documentation. Minn. R. 9549.0020, subp. 19, and 9549.0041. The auditors allow, disallow, or reclassify costs reported on the provider's cost report and, based upon adjusted allowable costs, calculate a prospective per diem rate for a rate year running from July 1 through the following June 30. Minn. R. 9549.0041, subp. 11, 13. Providers may appeal specific audit adjustments after they receive the final rate notice. Minn. Stat. § 256B.50, subd. 1b. If the appeal is not resolved informally, the provider may demand a contested case hearing. Minn. Stat. § 256B.50, subd. 1h. This contested case stems from desk audit appeals filed by the Providers for reporting years ending September 30, 1993, and September 30, 1994. See Notice of and Order for Hearing for each case and attachments thereto.

Both the Department and the Providers have filed motions for summary disposition in this matter. Summary disposition is the administrative equivalent of summary

judgment. Minn. Rules pt. 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. In considering motions for summary disposition, the Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts. See Minn. Rules pt. 1400.6600.

It is well established that, in order to successfully resist a motion for summary judgment, the nonmoving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. Id. To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. Id.

Both Providers completed major building projects[1] in 1993. Lyngblomsten had been previously informed by the Commissioner of Health in July of 1992 that the facility met the statutory requirements of having "commenced construction" or having taken substantial steps on the project prior to April 1, 1992, pursuant to Minn. Stat. § 144A.071, subd. 2(5). Ex. A attached to Sauer Affidavit, Attachment B. In a letter dated May 28, 1993, Lyngblomsten reported to the Department that it had completed its project on April 30, 1993. Ex. A. The project involved the construction of a three-story addition to be used for two dining rooms and a rehabilitation therapy space, the addition of two elevators in an unused stairwell, and the remodeling of two nursing stations. Id., Attachment A. The project was completed in two phases. The first phase involved an addition to the east wing of a three-story building used for skilled nursing care and the finishing of the second and third floor space for use as resident dining rooms, offices, and therapy. The second phase involved the finishing of the first floor of the addition built during the first phase to create new quarters for physical therapy and occupational therapy, the installation of two new elevators in an existing unused stairwell, the building of an elevator equipment room, the expansion and remodeling of the main lounge, the remodeling of nursing stations, the creation of new resident-use lounges, and the relocation of nourishment stations. Total construction costs related to the project were $1,234,223.00. Id. Lyngblomsten received a sizable increase in its property-related payment rate due to this major project.

In addition to the costs reported in the May 28, 1993, letter, Lyngblomsten also made a number of capital expenditures during the year prior to the project completion date. It did not include these costs as part of the project costs, but instead reported them as capital-repair-and-replacement costs on its cost report for the reporting year ending September 30, 1993. These costs were as follows: $2,789.34 for eighteen light fixtures

(first floor, South Building, administration wing); $478.96 for carpet (social service office on the second and third floors of the North Building); $19,938.00 for a nurse call system (second floor, South Building); $654.00 for floor covering (laundry); $1,210.50 for walk-in cooler repair (dietary); $1,099.50 for replacement of the compressor in the temperature control system (physical plant); $1,200,00 for bacteria filtering of heat system (North Building); $623.85 for carpeting (North Building); $2,535.82 for 14 glass window replacements (Care Center); $862.50 for elevator starter contacts (North Building); $820.02 for replacement of door-open relay switch; and $1,863.50 for window replacements (Care Center). The Department determined that these costs fell within the definition of "construction project." As a result, the Department disallowed total costs in the amount of approximately $34,076 from the capital-repair-and-replacement cost category and added them to the capital additions used to calculate Lyngblomsten's property-related payment rate for the July 1, 1994, rate year. Skorczeski Aff., Ex. 1 at 3; Sauer Aff., Ex. D at 8, 19-20. In response to Lyngblomsten's Requests for Admissions, the Department admitted that it would have recognized these costs as allowable capital repair and replacement costs if they had been incurred more than 12 months before or after the completion date of a construction project, as that term is defined in Minn. Stat. § 144A.071, subd. 1a(g) (with the exception of the amount spent for carpeting the social service office since that cost did not exceed $500). Skorczeski Aff., Ex. 1 at 3-4. Counsel for the Providers has asserted that the total expense for the carpeting was $1,102.80, which is well beyond the $500 threshold. Appellants' Memorandum in Support of Motion for Summary Disposition at 6, n.4.

Camilia Rose reported to the Department in a letter dated October 20, 1993, that it had completed its major construction project on August 23, 1993. Sauer Aff., Ex. E. The project consisted of the construction of a 3,700 square foot addition to its building in Coon Rapids at a total cost of $477,144.00. Id.; Skorczeski Aff., Ex. 1 at 4. Camilia Rose received a considerable increase in its property-related payment rate due to the completion of this major project. Camilia Rose also had a capital expenditure within a year of its August 23, 1993, project completion date. On December 31, 1993, more than four months after completion of the major project, it replaced the rooftop heating and cooling unit for its original building at a cost of $25,827.69. Sauer Aff., Ex. G; Skorczeski Aff., Ex. 1 at 4. Camilia Rose reported $15,000 of this cost in the capital-repair-and-replacement cost category and the remaining $10,827.60 in the category for projects under the minimum threshold. The Department determined that these costs fell within the definition of "construction project," disallowed them from the capital-repair-and-replacement cost category, and added them to the capital additions used to calculate the facility's property-related payment rate for the July 1, 1995, rate year. Sauer Aff., Ex. H at 8, 15-16. The Department admitted in response to Camilia Rose's Request for Admissions that it would have recognized the costs at issue in the appeal as allowable capital-repair-and-replacement costs if they had been incurred more than 12 months before or after the completion date of a construction project. Skorczeski Aff., Ex. 1 at 4.

Each of the Providers filed timely appeals of the desk auditors' adjustments disallowing capital-repair-and-replacement costs. After the Department upheld the adjustments in written determinations issued under Minn. Stat. § 256B.50, subd. 1h, the

Providers filed timely requests for contested case hearings. As noted above, these cases were consolidated for hearing by agreement of all parties.

The only issue presented for resolution in these consolidated cases is the propriety of the Department's determination that certain of the costs reported on the Providers' cost reports as capital-repair-and-replacement costs must be considered part of the major construction projects completed by the Providers during 1993 and thus must be reimbursed, if at all, through the property-related payment rate. The issue to be determined is a legal issue which turns upon the construction of the statutes governing these aspects of the rate system. The dispute in this case involves the proper meaning of the term "construction projects" and the proper interpretation of the statutory provision defining costs that are to qualify for payment through the capital-repair-and-replacement rate. As discussed above, the costs at issue were reported on the Providers' cost reports as allowable capital-repair-and-replacement costs. The Department argues that these costs must be treated as construction project costs, disallowed from the capital-repair-and-replacement payment rate, and reclassified with other construction projects in the property-related payment rate where they are subject to applicable limits and eligible for reimbursement only as costs of construction. Two statutory provisions are primarily at issue in this proceeding: Minn. Stat. §§ 256B.431, subd. 15, and 144A.071, subd. 1a(g). It is helpful to trace the chronology of the adoption of each of these provisions.

Among the steps taken by the Legislature in recent years to control expenditures for nursing home care was the imposition of a moratorium on nursing home construction projects and other costs. See Minn. Stat. § 144A.071, subd. 1 (1994). The moratorium statute, first enacted in 1983, originally imposed a moratorium on Medical Assistance certification of new nursing home beds and changes in certification to higher levels of care. See 1983 Minn. Laws, Ch. 199, § 1, codified in Minn. Stat. § 144A.071 (1984) as a portion of the Department of Health statutes relating to nursing homes. In 1992, the Legislature amended the statute to include a moratorium on large construction projects, with certain exceptions. See 1992 Minn. Laws, Ch. 513, Art. 7, §2, codified in Minn. Stat. § 144.071, subd. 2. Pursuant to this amendment, the Commissioner of Health is required to disapprove any construction project whose cost exceeds $500,000 or 25 percent of the facility's appraised value (whichever is less) unless the construction project satisfies certain specified criteria. See Minn. Stat. § 144A.071, subd. 2 (1994). "Construction project" was not defined in the statute as originally enacted. However, the Commissioner of Health was given authority to adopt emergency rules to implement the moratorium on construction projects.

In a separate part of the same 1992 legislation creating the moratorium on large construction projects, the Legislature also added subdivision 15 to Minn. Stat. § 256B.431, the DHS rate-setting statute. See 1992 Minn. Laws Ch. 513, Art. 7, § 97. Subdivision 15 establishes a capital-repair-and-replacement payment rate. Pursuant to the amendment, providers are permitted to report certain capital-repair-and-replacement costs (such as the costs of wall coverings, paint, floor coverings, window coverings, roof repair, and heating or cooling system repair or replacement) in excess of $500 in a special cost category on the annual cost report. The sum of these costs is then divided by the facility's actual resident days for the reporting year to create a separate per diem capital-repair-and-

replacement payment rate that is payable the following rate year, subject to certain restrictions. Minn. Stat. § 256B.431, subd. 15(b). Subdivision 15(d), which is now codified as 15(e), provides as follows:

> If costs otherwise allowable under this subdivision are incurred as the result of a project approved under the moratorium exception process in section 144A.073, or in connection with an addition to or replacement of buildings, attached fixtures, or land improvements for which the total historical cost of these assets exceeds the lesser of $150,000 or ten percent of the nursing facility's appraised value, these costs must be claimed under subdivision 16 [the equity incentive provision] or 17 [the special provisions for moratorium exceptions], as appropriate.

(Emphasis added.) Subdivisions 16 and 17 were also added to the law by the 1992 legislation. See 1992 Minn. Laws Ch. 513, Art. 7, §§ 98-99, codified as Minn. Stat. § 256B.431, subds. 16 and 17 (1994). Subdivision 16 provides that nursing facilities shall be eligible for an equity incentive payment rate if the facility acquires capital assets in connection with a moratorium exception project or in connection with an addition to or replacement of buildings, attached fixtures, or land improvements in excess of the statutory threshold. Subdivision 17 limits the amount of costs incurred that will be allowed for MA rate-setting purposes even where the construction project was approved under the moratorium exception process. For example, limitations are placed on the allowable interest expense on debt and the Department will not recognize for MA reimbursement any expenditure in excess of a nursing home's replacement-costs-new limit. See Minn. R. 9549.0060, subp. 4(B) and Minn. Stat. § 256B.431, subd. 17(b) and (e). Providers that complete a major project can qualify to use increased replacement-cost-new per-bed limits when having their property-related payment rate recalculated. Minn. Stat. § 256B.431, subd. 17(e).

In 1993, the Legislature rewrote subdivision 10 of Minn. Stat. § 256B.431 to include the following language:

> A nursing facility's request for a property-related payment rate adjustment and the related supporting documentation of project construction cost information must be submitted to the commissioner within 60 days after the construction project's completion date to be considered eligible for a property-related payment rate adjustment. Construction projects with completion dates within one year of the completion date associated with the property rate adjustment request and phased projects with project completion dates within three years of the last phase of the phased project must be aggregated for purposes of the minimum thresholds in subdivisions 16 and 17, and the maximum threshold in section 144A.071, subdivision 2. "Construction project," "project construction costs," and "phased project" have the meanings given them in Minnesota Rules, part 4655.1110 (Emergency).

(Emphasis added). See 1993 Minn. Laws, Ch. 339, § 20.

As mentioned above, the Commissioner of Health was given authority to issue emergency rules relating to the moratorium statute. In 1993, the Commissioner of Health issued emergency rules which, inter alia, included a definition of "construction project" for purposes of Minn. Stat. § 144A.071. See Minn. R. 4655.1110, 17 State Reg. 1955-56 (Feb. 8, 1993). During its effective period, Minn. R. 4655.1110 read as follows:

> Subp. 9. Construction Project. "Construction project" means:
>
> A. A capital asset addition to, or replacement of, a nursing home or certified boarding care home that results in new space or the remodeling of or renovations to existing facility space.
>
> B. The remodeling or renovation of existing facility space the use of which is modified as a result of the project described in item A. This existing space must be used for its intended function as described on the construction plans on completion of the project described in item A.
>
> C. Capital asset additions or replacements that occur within 12 months before or after the completion date of the project described in item A.
>
> D. Additions, replacements, renovations, or remodeling projects or portions of projects that, despite occurring more than 12 months before or after the completion date of a construction project, are considered phased projects.

Because Minn. R. 4655.1110 was an emergency rule, it remained in effect only for 180 days. The Department of Health did not seek an additional 180-day extension of the emergency rule or propose to adopt it as a permanent rule. See Minn. Stat. § 14.35 (1994) (since repealed) (emergency rules can remain in effect only 180 days, with the opportunity to be renewed one time only). In 1993, the Minnesota Legislature enacted the provisions of Minn. R. 4655.1110 that are relevant to this case into statute. 1993 Minn. Laws, 1st Sp., Ch. 1, Art. 5, § 2, subsequently codified in Minn. Stat. § 144A.071, subd. 1a(g). Pursuant to that statutory provision, "construction project" is defined as follows:

> (1) a capital asset addition to, or replacement of a nursing home or certified boarding care home that results in new space or the remodeling of or renovations to existing facility space;
>
> (2) the remodeling or renovation of existing facility space the use of which is modified as a result of the project described in clause (1). This existing space and the project described in clause (1) must be used for the functions as designated on the construction plans on completion of the project described in clause (1) for a period of not less than 24 months; or
>
> (3) capital asset additions or replacements that are completed within 12 months before or after the completion date of the project described in clause (1).

Minn. Stat. § 144A.071, subd. 1a(g) (1994).

The Providers' repairs and replacements at issue in this proceeding were not additions to or replacements of a nursing home that resulted in new space or the remodeling or renovation of existing facility space within the meaning of the first clause of Minn. Stat. § 144A.071, subd. 1a(g), nor were these costs incurred to remodel or renovate existing facility space the use of which was modified as a result of an addition to or replacement of a nursing home that resulted in new space or the remodeling or renovation of existing space within the meaning of the second clause of Minn. Stat. § 144A.071, subd. 1a(g). See Department's Answer to Request for Admissions No. 2, attached as Ex. 1 to Skorczeski Affidavit. The Department relies solely on the third clause of the statutory definition of "construction project" as a basis for its disallowance of the disputed expenses.

The Providers argue, primarily based upon the language of Minn. Stat. § 256B.431, subd. 15(e), that repair costs that are unrelated to a major construction project must not be treated as costs of that major construction project, i.e., that repair costs must bear a functional relationship to the major construction project in order to be included as a cost of the major project. They assert that the Department is, in essence, attempting to construe Minn. Stat. § 144A.071, subd. 1a(g)(3), in a fashion that assumes the implied repeal of Minn. Stat. § 256B.431, subd. 15. The Providers contend that this is improper and would require a result that is directly contrary to the language of Minn. Stat. § 256B.431, subd. 15(e), which presumes that only the costs of repairs and replacements functionally related to major construction projects will be classified outside the repair and replacement cost category. They point out that laws in pari materia with each other must be construed to give effect to all of their provisions if possible, and argue that it is possible to give effect to both Minn. Stat. §§ 144A.071, subd. 1a(g) and 256B.431, subd. 15.

In response, the Department stated that it does not contend that there has been an implied repeal of Minn. Stat. § 256.431, subd. 15. Instead, the Department argues that the Legislature intended that the temporal relationship between a repair cost and a major construction project, rather than its functional relationship, would determine whether the cost is incurred in connection with the construction project. Thus, the Department asserts that, by operation of statute, all capital-repair-and-replacement costs that occur either within 12 months before or 12 months after the completion date of the project are deemed part of the project and are necessarily incurred as a result of or in connection with the project. The Department contends that its application of the definition of "construction project" is required by statute and is consistent with the statutory scheme for reimbursing nursing facilities for their property-related costs. It further asserts that its approach generally favors facilities by making it more likely that a project will meet the minimum threshold to qualify as a major project and results in simple and certain determinations of the scope of a facility's project. The Department also argues that the approach urged by the Providers will lead to uncertainty and disputes regarding what is functionally part of a project.

General canons of statutory construction are set forth in Chapter 645 of the Minnesota Statutes. Minn. Stat. § 645.39 states that "a later law shall not be construed to repeal an earlier law unless the two laws are irreconcilable" and the new law purports to be

a revision of all laws on a certain subject or purports to establish a uniform and mandatory system covering a class of subjects. Minn. Stat. § 645.26 provides in pertinent part that, "[w]hen a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both." Thus, if there is an apparent conflict between a general provision and a special provision in the same or another law, "the two shall be construed together and, if possible, harmonized and reconciled and effect given to both." Aslakson v. State, 217 Minn. 524, 15 N.W.2d 22, 24 (1944).

In this case, the relevant provisions of Minn. Stat. §§ 256B.431 and 144A.071, subd. 1a(g), are not irreconcilable and may be construed together and harmonized in a fashion that gives effect to both provisions. Minn. Stat. § 256B.431 governs the determination of payment rates for resident care costs incurred by nursing homes. Subdivision 15(e) precludes costs from being claimed under the capital-repair-and-replacement cost category if they are "incurred as the result of a project approved under the moratorium exception process . . . or in connection with an addition to or replacement of buildings, attached fixtures, or land improvements" meeting certain specified criteria. .Subdivision 10 instructs directs the Department to make adjustments under subds. 16 and 17 to a provider's property-related payment rate after completion of a major project and further specifies that the Department must use the definition of "construction project" originally contained in the emergency rule, which has now been enacted into statute. Minn. Stat. § 144A.071, subd. 1a(g), defines the phrase "construction project" to include "capital asset additions or replacements that are completed within 12 months before or after the completion date of the project . . . ." Based upon this provision, it is evident that the Legislature intended that the costs of "capital asset additions or replacements" completed within 12 months before or after the completion of such a project must be aggregated with the cost of the project and treated as a part of that project for cost-reporting purposes. The Legislature thus clearly expressed an intention in subdivision 15 that costs incurred as a result of a moratorium exception project or in connection with a major project shall not also be claimed under the capital-repair-and-replacement cost category. The two provisions, construed together, are not necessarily inconsistent. As the Department contends, they may be harmonized to reach the conclusion that the Legislature intended to include all "capital asset additions or replacements" occurring within the specified time period as part of the major project or moratorium exception project and intended to disallow such costs from the capital-repair-and-replacement cost category.

Such an interpretation appears to be consistent with the Findings submitted by the Commissioner of Health at the time the emergency rule was adopted as well as with the legislative history of Minn. Stat. § 144A.071, subd. 1a(g). The original version of the emergency rules proposed by the Commissioner defined "construction project" to include, inter alia, "[c]apital asset additions or replacements that have occurred or will occur within 12 months of the completion date of the project described in item A." 17 State Reg. 1166 (Nov. 9, 1992). After the Commissioner received comments on the proposed rule, the provision was revised to refer to "[c]apital asset additions or replacements that occur within 12 months before or after the completion date of the project described in item A." 17 State Reg. 1956 (Feb. 8, 1993). In the Findings of Fact, Conclusions, and Order Adopting

Emergency Rule issued by Deputy Commissioner Mary Jo O'Brien on December 29, 1992, the Department indicated that the changes in wording were made in an attempt to clarify the provision:

> The revised language is clear that the definition of a "construction project" also includes the capital asset additions or replacements that occur within 12 months before or after the completion of the project. For example, if a construction project is completed in July, 1993, any capital asset additions or replacements that occurred prior to this date would be considered in determining the cost of the projects and whether the statutory dollar threshold is exceeded. Similarly, if a nursing home intends to undertake a capital asset addition or replacement after July, 1993, the cost of the completed project and the future project will be evaluated to determine if the dollar threshold in the law is exceeded. Since the date of the completed construction project, in this case July, 1993, is known, the revised rule clarifies how often [sic] capital asset additions or replacements before or after that project will be treated. The Department believes that this provision is in accordance with the provisions of the statute to provide controls on nursing home property expenditures and is consistent with the property reimbursement rules of the Department of Human Services.

(Emphasis added.) The clear import of the Commissioner's Findings is that the cost of "any" capital asset additions or replacements occurring during either the year prior to the project or the year after the project would be aggregated with the cost of the project. There is no intimation in the Findings that the capital asset additions or replacements must be related to the project in any way other than their temporal relationship. Moreover, the Findings refer to the capital asset additions or replacements as separate "projects," underscoring that a functional relationship to the major project was not required.

The definition of "construction project" added to the Minn. Stat. § 144A.071, subd. 1a(g), in 1993 was part of S.F. 1146, a Department of Health bill. That bill was initially incorporated into the omnibus bill (S.F. 1496) which was vetoed by Governor Carlson at the end of the regular legislative session. The provision was later reenacted and signed into law during the first special session of the Legislature in 1993. See 1993 Minn. Laws, 1st Sp., Ch. 1, Art. 5, § 2. At the time of the consideration of S.F. 1146 by the Senate Health Care Committee, Senator Finn proposed an amendment to be incorporated in S.F. 1146. Senator Finn's amendment would have permitted a Pine River nursing home to increase the dollar threshold on a previously-approved moratorium exception project for construction of a new dining room and relocation of patient rooms in order to include the costs of an unrelated kitchen/sewer system repair and renovation project. Linda Sutherland of the Department of Health was also present during the Committee debate. The following colloquy occurred:

> Sen. Finn: They [referring to the nursing home in Pine River] have a collapsing sewer pipe under a floor that has to be replaced and repaired and they also at this time currently have a moratorium exception project that has previously been approved and they're in the process of trying to move ahead

to get that exception project implemented but in doing so they want to address this other problem that's related to the sanitary sewer system which also has to be replaced. The concern, as I understand it, is that, if they have to wait a year and a day after the completion of the current moratorium exception project, they're looking at doing a project down the road that would be increased by [sic] cost by approximately 25% by waiting that long and they could save a lot of the duplicative costs and the contracting cost if they could work that repair and renovation project to their kitchen area and sewer line into this moratorium exception project. . . . I had understood that [the nursing home] wanted to go ahead with their moratorium exception project and this was a different project related to repair, renovation, replacement of a correction violation and some associated costs that would be incurred in proceeding with that activity. And I think what they're talking about is that additional kitchen work, as I understand it, the kitchen renovation repair that could be accomplished and probably would be accomplished at some point in the future but they want to collapse it down and do it because--well--in responding to the correction repair order they've got to incur various costs that could--that would be duplicated later on when they do the additional project. And that was the interest, is trying to save money in this entire process and I understood that the figures that they've given to us, Senator Berglin, were something in the neighborhood of 25 to 40 thousand dollars overall in that project that they could save by collapsing these projects.

Chair: Sen. Berglin?

Sen. Berglin: Madam Chair, I would just like to ask Ms. Sutherland to speak to this because she's much more familiar with the details of the project than probably either one of us are.

Sen. Finn: Right.

Chair: Ms. Sutherland?

Ms. Sutherland: Thank you. I'm Linda Sutherland from the Health Department. It's my understanding that the original project for this facility was to construct a new dining room and to move some patient rooms around and that was the project that would cost in excess of a million dollars and was approved through the last moratorium tentative process. Since that time, property reimbursement rates have improved and Mr. Wolf approached us with the idea that now would be a good time in conjunction with his moratorium project to also redo the kitchen. And he does have a problem that could result in a correction order from the Health Department--we've not yet issued it because we've been discussing it with him--with a collapsing floor drain. It may be necessary in fixing the floor drain to dig up the kitchen floor. If he has to do that, he might have to pull a cabinet out. If he pulls the cabinet out, he would rather not have to just put the old one back, he'd like to do that project of fixing up his kitchen. He could do the

kitchen repair a year and a month after he finishes his moratorium project and those costs would be allowed. His argument is that it would be cheaper in the long run for him to be able to do the projects all together. So he would have his million dollar plus moratorium exception project and he wants to spend an additional amount of money which I believe is a couple hundred thousand dollars on other work. I think that it is correct that it would probably be cheaper to do all the work and have all the construction people on site at one time. However, it's our opinion that the intent of the Legislature has always been to control costs on capital improvements. The previous way we controlled that was anything that related to a bed, we controlled by having people go through the competitive process. Then last May the Legislature changed and said anything, whether it's bed-related or otherwise, can be done up to $500,000. But that he really needs to choose which of these projects because we didn't think that he got to be able to take advantage of both of those cost control provisions and that's been our position.

Chair: So, Sen. Finn?

Sen. Finn: Madam Chair, members, I point out that this particular project would be limited by--and it's very tightly limited in the language that has been prepared here by counsel--to, one, it's going to be triggered by the correction order that's going to require that the work has to be done, it's also going to be required that there's an on-going current exception project that it can be done in conjunction with, and three, that it's going to be incurred in southern Cass County. And I think that those particular limitations will make sure that we don't have a floodgate. I would just take a vote on the amendment.

Sen. Berglin: Madam Chair?

Chair: Senator Berglin.

Sen. Berglin: I guess as reluctantly as I feel I need to do this because I know [inaudible] is a good friend and I'm sure that these people are good people that are in this nursing home, but I would reluctantly oppose the amendment because even though it is drafted very narrowly to affect this one facility, the principle embodied in the amendment applies beyond this one facility, and I think we kind of need to draw the line. Now, he's got a million dollar moratorium exception. If he wants to do this floor drain within the cost of that million dollars and leave out something else that he was going to do that maybe doesn't need to be done as badly, he can do the floor drain within that million dollars. And I think adding more to this--the amount that he is going to be allowed to spend on his facility just leaves us open to having to do that for everybody else.

Excerpt transcribed from tape recording of the debate in the Senate Health Care Committee on Tuesday, April 8, 1993 (emphasis added). The Chair announced that they

were running out of time, so debate ended at that point. A vote was taken, and the amendment sought by Senator Finn was not adopted. A specific statutory provision making an exception for the Pine River nursing home was, however, later enacted into statute. See Minn. Stat. § 144A.071, subd. 4a(o) (1994).

This legislative history is significant to the issues presented in the present case because it reflects the view of the Committee and Department of Health that, if a special exception had not been enacted for this nursing home, the nursing home would have had to wait until more than one year had elapsed after the completion of the current moratorium project before it could commence the kitchen repair project in order to claim the cost and obtain reimbursement. Accordingly, the legislative history is consistent with the plain meaning of the statute in that it, too, suggests that all capital asset additions and replacements (even repair projects) occurring within a year of completion of a moratorium exception project are included in the definition of "construction project."

It is also evident based upon both the plain language of Minn. Stat. § 144A.071, subd. 1a(g), and the Department of Health's Findings relating to the temporary rule provision that the Legislature intended that the definition of "construction project" encompass both projects completed within one year before the completion date of the major project and those completed within one year after the completion date of the major project. The Department thus properly determined the time frame surrounding the project completion dates during which capital expenditures were considered part of the project. The Department's interpretation gives the word "or" the disjunctive meaning urged by the Providers because, under the Department's approach, an expenditure is deemed to be part of a construction project if it occurred either within twelve months before the project's completion date or twelve months after. It is not possible for any particular expenditure to fall into both categories. [2]

This appeal presents the further issue of what is meant by the phrase "capital asset additions or replacements" contained in Minn. Stat. § 144A.071, subd. 1a(g)(3). The Providers assert that the repair and replacement costs at issue here did not constitute "capital asset additions or replacements." They contend that the meaning of "capital asset additions or replacements" in the third clause of the definition must be consistent with the meaning set forth in the first clause, which clearly means capital asset additions or replacements of nursing homes. Although the Providers concede that the disputed repair projects did involve capital assets, they assert that the projects did not involve capital asset additions to or replacements of a nursing home. The Providers also argue that the approach taken by the Department ignores the definition of "addition" contained in Rule 50, which defines an "addition" as an "extension, enlargement, or expansion of the nursing facility for the purpose of increasing the number of licensed beds or improving resident care." Minn. Stat. § 9549.0020, subp. 3 (1993) (emphasis added). They also contend that, even if the Department properly determined that repair costs must be aggregated with unrelated construction costs, the Department lacks authority to aggregate costs within the 24-month period surrounding the date on which the major project was completed and must select repair costs for aggregation from either the 12-month period immediately preceding project completion or the 12-month period following completion.

The Department's interpretation of the definition of "construction project" contained in Minn. Stat. §144A.071, subp. 1a(g)(3), is consistent with the plain language of the definition. As determined above, it is in accordance with the plain language of the statute as well as its history to find that the third clause of the definition encompasses additions to or replacements of any of a facility's capital assets, not just its building. Minn. Stat. § 144A.071, subd. 1a, states that the term "capital assets" has the meaning given in Minn. Stat. § 256B.421, subd. 16, which, in turn, specifies that "capital assets" means "a nursing facility's buildings, attached fixtures, land improvements, leasehold improvements, and all additions to or replacements of those assets used directly for resident care." The Rule 50 definition of "addition" is not applicable because it is inconsistent with this statutory definition of "capital asset" set forth in Minn. Stat. § 256B.421, subd. 16. Because the latter definition specifically applies to Minn. Stat. § 256B.431, subds. 13 to 21, it should take precedence over the Rule 50 definition. In addition, the fact that, unlike the first two clauses, the third clause of the definition of "construction project" does not refer to facility "space" renders it more likely that the third clause was intended to apply to additions to replacements of a broader range of capital assets. The Administrative Law Judge thus finds that the types of repair and replacement costs at issue in the present proceeding fall within the meaning of the phrase "capital asset repairs and replacements" as used in Minn. Stat. § 144A.071, subp. 1a(g)(3).

There appear to be no relevant facts in dispute regarding the issues being appealed in this proceeding. Based upon the plain language of the statutory provisions involved, and consistent with the history of Minn. Stat. § 144A.071, the Administrative Law Judge concludes that nursing homes who complete moratorium exception or major projects may, as a result, lose their ability to have their capital expenditures which are defined as part of the project reimbursed through the capital-repair-and-replacement payment rate. The Department is entitled to summary disposition in this matter.

B.L.N.

[1] Pursuant to Minn. Stat. § 256B.431, subd. 15(e) (1994), a facility with a project that exceeds the lesser of $150,000 or ten percent of the nursing facility's appraised value qualifies for certain beneficial adjustments to its property-related payment rate. The term "major project" will be used to describe projects exceeding this statutory threshold.

[2] Facilities report their costs on an annual basis. Therefore, the statutory requirement that costs be aggregated within twelve months before and after the completion date of a project results in facilities in essence being limited to one moratorium exception project or major project per year.